88-1158

SUPREME COURT, U.S.
FILED
DEC 31 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

MARCOS J. PEREZ,
Petitioner,

and

SEAN BURKE,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

1. Whether Connecticut's Youthful Offender Statutory Scheme, which provides special protections for youths 16 to 18 years of age, who are charged with crimes not classified as Class A felonies by Connecticut law, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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v.

STATE OF CONNECTICUT

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF CONNECTICUT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioners respectfully pray that a writ of certiorari issue to review

the order for the Supreme Court for the state of Connecticut entered in this proceeding on November 1, 1988.

OPINIONS BELOW

The Connecticut Supreme Court issued its order dismissing the Petitioners' appeal for lack of a final judgment on November 1, 1988. That order is represented in Petitioners' appendix.

The trial courts opinion denying youthful offender status to both Petitioners was issued on July 22, 1988 and is reprinted in Petitioners' appendix. Excerpts from a hearing dated July 15, 1988 on youthful offender eligibility for Petitioner are also reported in Petitioners' Appendix.

JURISDICTION

The order of the Connecticut Supreme Court dismissing the Petitioners' appeal was rendered on November 1, 1988. The Petition for a writ of certiorari was filed within sixty

(60) days of the order. This Courts' jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce law which shall abridge the privilege and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 1, 1988, warrants were issued for the arrest of Marcos J. Perez and Sean Burke (hereinafter "Petitioners") for felony murder in alleged violation of Connecticut General Statutes (hereinafter "C.G.S.") Section 53a-54(c) and robbery in the first degree in alleged violation of C.G.S. Section 53a-134. On June 6, 1988, a second warrant was issued for the arrest of the Petitioners for robbery in the first degree in alleged violation of C.G.S. Section 53a-134, and unlawful restraint in the first degree in alleged violation of C.G.S. Section 43a-95, and assault in the third degree in alleged violation of C.G.S. Section 53a-61, and larceny in the third degree in alleged violation of C.G.S. Section 53a-124. The warrant for the arrest of Petitioner-Burke also alleged that he committed threatening in violation of C.G.S. Section 53a-62.

On June 20, 1988, each Petitioner filed a Motion for Investigation of Eligibility to be Adjudged a Youthful Offender (with an attached memorandum) pursuant to C.G.S. Section 54-76c. On July 15, 1988, in a closed hearing before the Honorable M. Morgan Kline, the Petitioners argued in support of their motion. In addition, Judge Kline reviewed the investigative report of the Petitioners' background, which had been conducted by the Office of Adult Probation pursuant to C.G.S. Section 54-76d(a).

At the request of Judge Kline, a hearing was held in chambers on July 19, 19888. See Appendix C, p. C-2. Both of the Petitioners' attorneys and the State's Attorney were present. Id. A discussion was held as to a method of procedure in this case that would accommodate the substantive and procedural problems of the youthful offender statutory scheme. See Appendices D and E at D-3 and

E-3. As a result of this conference, each Petitioner executed a Stipulation and Waiver under Seal on July 22, 1988. See id.

In the July 22, 1988 youthful offender hearing, Judge Kline determined that the Petitioners were ineligible to be adjudged as youthful offenders, commenting,

> "[i]t is my feeling in order to properly comport with the statute I have to make the determination today as to what status should be granted...the acts in both files, one being a murder, taking of a life, and the other being a rather severe assault and robbery first degree with a threat being made, with a display of a knife and other things occurring, the crimes are severe enough that not even young men not of tender years but lesser years, should know better."

See Appendix C, pp. C-9, C-10.

Both Petitioners took a timely exception from the denial of their application for youthful offender status. See Appendix C, p.

C-13. Each Petitioner filed an appeal to the Appellate Court on August 10, 1988. Petitioners filed a Motion to Consolidate Appeals on August 15, 1988 and on September 9, 1988, the Motion was granted. In addition, each Petitioner properly requested that the case be transferred to the Connecticut Supreme Court, and on September 8, 1988, the Connecticut Supreme Court accepted the appeal.

On November 1, 1988, after oral arguments, the Connecticut Supreme Court dismissed the appeals for lack of a final judgment.

REASONS FOR GRANTING THE WRIT

THE CONNECTICUT SUPREME COURT DISMISSED THE PETITIONERS' APPEAL FOR LACK OF A FINAL JUDGMENT WHICH PRECLUDES CONSTITUTIONAL REVIEW OF THE STATUTE RESULTING IN REPEATED VIOLATIONS OF CONSTITUTIONAL RIGHTS.

ARGUMENT

THE CONNECTICUT YOUTHFUL OFFENDER STATUTORY SCHEME VIOLATES THE DUE PROCESS CLAUSE OF THE

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT: (1) ELIGIBILITY IS DETERMINED PARTLY FROM THE SERIOUSNESS OF THE CRIME CHARGED; AND (2) ELIGIBILITY IS PRECLUDED FOR YOUTHS CHARGED WITH CLASS A FELONIES, AND THEREFORE, IS NOT RATIONALLY RELATED TO ITS PURPOSE.

Connecticut's Youthful Offender Act, 1971 P.A. 72, Senate Bill 947, was patterned after New York's Code of Criminal Procedure, Section 913e-913r,[1] and became effective October 1, 1971. See

---

[1]Subsequently, the New York Youthful Offender Act was held unconstitutional by the New York Court of Appeals. See People v. Drummond, 40 N.Y.2d 991, 391 N.Y.S.2d 67 (1976). In declaring the act as unconstitutional, the Drummond Court concurred with the dissenting opinion of Justice Rabin in People v. Santiago, 51 A.D.2d 1, 379 N.Y.S.2d 843 (1975). See Santiago, 51 A.D.2d at 14-16, 379 N.Y.S.2d at 857-59 (Rabin, J., dissenting). The New York legislature followed by amending the youthful offender act and required that youthful offender status be determined upon conviction of the underlying charges. See N.Y. Crim. Proc. Law Section 720.10 et seq. (McKinney 1988).

Conn. Gen. Stat. Sections 54-76b et seq. When a defendant is adjudged as a youthful offender, the defendant is entitled to a private trial, to have all records sealed, to be segregated before trial from other defendants over the age of eighteen, to be free of criminal liability, to be sentenced as a youthful offender and not as an adult, and to have all records erased when he reaches twenty one years old. See id. The scheme envisioned by the Youthful Offender Act is the avoidance of stigma and the practical and collateral consequences attendant upon conviction. See People v. Plath, 71 N.Y.S.2d 667, 668 (1947). The court in Plath, as articulated by the Connecticut House of Representatives, 1971 P.A. 72, Senate Bill 497, House at 1232, referred to the Youthful Offender Act as a humane and progressive piece of legislation with the intent to benefit a youth who makes a first mistake and ought not to be branded as a criminal forever.

As recognized by the Connecticut Supreme Court in State v. Bell, 179 Conn. 98, 425 A.2d 574 (1979) "[s]ubsequent criminal proceedings, no matter what the eventual outcome, cannot regain for the defendant the privacy lost through the denial of his application and consequent public trial." Id. at 99. Thus, a denial of a youthful offender application causes irreparable harm to an accused which cannot be replaced by a favorable decision from an appeal after conviction.

The Connecticut Supreme Court dismissed the Petitioners' appeal for lack of a final judgment. In their appellate brief, the Petitioners argued that
the statute, as applied, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Nevertheless, the Supreme Court refused to address this issue.

A defendant who is denied the protections of the youthful offender statute and who is subjected to a public trial has no remedy for an appeal after a disposition is rendered from the public trial. The damage from the public trial has already been incurred. Therefore, such a defendant is highly unlikely to appeal the constitutionality of the statute and the unconstitutional statute remains in force with repeated violations of constitutional rights occurring.

The Petitioners contend that the Connecticut Youthful Offender Scheme violates the fundamental fairness which is mandated by the Due Process Clause in that: (1) eligibility is determined partly from the seriousness of the crime charged; See Connecticut General Statutes §54-76d(b) and Appendix C-6; and (2) eligibility is precluded for youths charged with Class A felonies. See Connecticut General Statutes §54-76(b).

Determining the eligibility for a statutory right on more unproven allegations from a prosecutors' indictment offends reasonable motions of fairness. See People v. Santiago, 51 A.D.2d 1, 379 N.Y.S. 2d 843, 858 (1975) (Rabin, J. directing). "It is clear that an indictment does not survive a trial and verdict; it should play no part in determining the type of post-conviction treatment accorded to youngsters otherwise eligible for youthful offender consideration." Id. (emphasis added). Furthermore, such a scheme allows for prosecutorial manipulations -- elevation of the severity of the crime or crimes charged -- in an effort to preclude eligibility for youthful offender status.

The law as applied, is not rationally related to its purpose. The purpose is for the protection of youths from the damages of a public trial. However, the law presently allows the prosecution to circumvent that

purpose by charging an otherwise eligible youth with a more serious crime so as to prevent the youth from obtaining the benefits of that statute. Therefore, the law as it exists, serves no legitimate or nonillusionary state purpose resulting in a violation of Due Process.

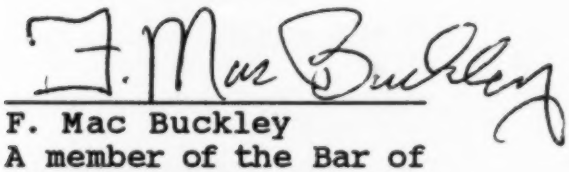
CONCLUSION

Connecticuts' Youthful Offender statutory scheme violates fundamental fairness which the Due Process Clause provides in that the main criteria for determining eligibility is the seriousness of the crime charged. This allows for prosecutorial manipulation by charging a more serious crime to prevent a youth from obtaining the protections for which the statute is designed.

The Connecticut Supreme Courts dismissal of the Petitioners' appeal for lack of a final judgment will only perpetuate the constitutional violations which continue to exist. Defendants who are denied youthful offender status will not appeal the constitutionality of the statute after conviction from a public trial as the protections of the statute are irretrievable. Therefore, this Honorable Court should grant this Petition for Certiorari to determine the

constitutionality of Connecticuts' Youthful Offender Act.

Respectfully submitted,
The Petitioner
Sean Burke



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A member of the Bar of
the Supreme Court of the
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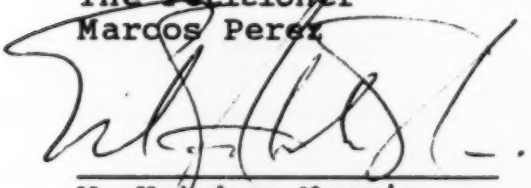
The Petitioner
Marcos Perez



M. Hatcher Norris
A member of the Bar of
the Supreme Court of the
United States

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APPENDIX A

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Connecticut General Statutes (rev. to 1987)

Section 54-76b provides:

> For the purpose of sections 54-76b to 54-76n, inclusive, "youth" means a minor who has reached the age of sixteen years but has not reached the age of eighteen years; and "youthful offender" means a youth who has committed a crime or crimes which are not class A felonies, who has not previously been convicted of a felony or been previously adjudged a youthful offender, or been afforded a pretrial program for accelerated rehabilitation under section 54-56e, and who is adjudged a youthful offender pursuant to the provisions of said sections. The interstate compact on juveniles, except the provisions of

article four thereof, shall apply to youthful offenders to the same extent as to minors below sixteen years of age.

Section 54-76c provides:

In any case where an information or complaint has been laid charging a defendant with the commission of a crime, and where it appears that the defendant is a youth, upon motion of the defendant, his counsel, the state's attorney or the prosecuting attorney, as the case may be, to the court having jurisdiction that an investigation be made of such defendant for the purpose of determining whether he is eligible to be adjudged a youthful offender, the court shall, but only as to the public, order such information or complaint to be filed as a sealed information or complaint. The court on its own motion may, but only as to the

public, order the information or complaint sealed in the case of a youth charged with crime.

Section 54-76d provides:

(a) If the court grants such motion or if the court on its own motion determines that the defendant should be investigated hereunder and the defendant consents to physical and mental examinations, if deemed necessary, and to investigation and questioning and to a trial without a jury, should a trial be had, the information or complaint shall be held in abeyance and no further action shall be taken in connection with such information or complaint until such examinations, investigation and questioning are had of the defendant. Investigations under sections 54-76b to 54-76n, inclusive, shall be made by an adult probation officer. When the

information or complaint charges commission of a felony, the adult probation officer shall include in the investigation a summary of any unerased juvenile record of adjudications of the defendant.

(b) Upon the termination of such examinations, investigation and questioning, the court, in its discretion based on the severity of the crime, which shall also take into consideration whether or not the defendant took advantage of the victim because of the victim's advanced age or physical incapacity, and the results of the examinations, investigation and questioning, shall determine whether such defendant is eligible to be adjudged a youthful offender. If the Court determines that the defendant is eligible to be so adjudged, no further action shall be taken on the information or complaint

and the defendant shall be required to enter a plea of "guilty" or "not guilty" to the charge of being a youthful offender. If the court determines the defendant ineligible to be so adjudged, it shall order the information or complaint to be unsealed and the defendant shall be prosecuted as though the proceeding hereunder had not been had.

Section 54-76e provides:

If the defendant enters a plea of "not guilty" or if the court on its own motion so directs, the defendant shall be tried for the purpose of determining whether he shall be adjudged a youthful offender. The trial shall be held by the court without a jury.

Section 54-76f provides:

No statement, admission or confession made by the defendant to the court or to any person designated by the court to conduct

the examinations, investigation and questioning referred to in section 54-76d shall ever be admissible as evidence against him or his interest, except that the court may take such statement, admission or confession into consideration at the time of sentencing such defendant, if the defendant has been adjudged a youthful offender, or has been found guilty of the crime charged in the information or complaint upon which the proceedings hereunder were based, or any subsequent crime.

Section 54-76g provides:

If the defendant enters a plea of guilty to the charge of being a youthful offender or if, after trial, the court finds that he committed the acts charged against him in the information or complaint, the court shall adjudge the defendant to be a youthful offender and

the information or complaint shall be considered a nullity and of no force or effect.

Section 54-76h provides:

> All of the proceedings except proceedings of the motion under section 54-76c had under the the provisions of sections 54-76b to 54-76n, inclusive, shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes. If such defendant is committed while such examination and investigation is pending, before trial, during trial or after judgment and before sentence, those persons in charge of the place of detention shall segregate such defendant, to the extent of their

facilities, from defendants over the age of eighteen years charged with crime.

Section 54-76i provides:

> Pending and during the investigation, trial, adjudication or acquittal of the defendant, or any other proceedings under sections 54-76b to 54-76n, inclusive, the court to which the recommendation for the investigation has been made shall have the same powers over the person of the defendant as it would have in the case of an adult charged with crime.

Section 54-76j provides:

> The court, upon the adjudication of any person as a youthful offender, may (1) commit the defendant, (2) impose a fine not exceeding one thousand dollars, (3) impose a sentence of conditional discharge or a sentence of unconditional discharge, (4) impose a sentence of community service, or (5) impose sentence and

suspend the execution of the judgment. In the latter case, the defendant may be placed on probation for a period not to exceed three years, provided the court in its discretion may from time to time, while such probation is in force, extend such probation for a period not to exceed five years, including the original probationary period. If the court has reason to believe that the person adjudicated to be a youthful offender is or has been an unlawful user of narcotic drugs as defined in section 21a-240, and the court places such youthful offender on probation, the conditions of probation, among other things, shall include a requirement that such person shall submit to periodic tests to determine, by the use of "synthetic opiate antinarcotic in action," nalline test or other detection tests, at a hospital or other facility,

equipped to make such tests, whether such person is using narcotic drugs. A failure to report for such tests or a determination that such person is unlawfully using narcotics drugs shall constitute a violation of probation. Commitment hereunder shall be for a period not to exceed three years and shall be to any religious, charitable or other institution, other than an institution supported or controlled by the state or a subdivision thereof, such commitment shall be made, when practicable, to a religious, charitable or other institution under the control of person of the same religious faith or persuasion as that of the youthful offender. If a youthful offender is committed by the court to any institution other than an institution supported or controlled by the state or a subdivision thereof, which is under the

control of person of a religion or persuasion different from that of the youthful offender, the court shall state or recite the facts which impel it to make such disposition, and such statement shall be made a part of the record of the proceedings.

Section 54-76k provides:

No determination made under the provisions of sections 54-76b to 54-76n, inclusive, shall operate as a disqualification of any youth subsequently to hold public office or public employment, or as a forfeiture of any right to privilege to receive any license granted by public authority and no youth shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction.

Section 54-671 provides:

The records of any youth adjudged a

youthful offender, including fingerprints, photographs and physical descriptions, shall not be open to public inspection, but such fingerprints, photographs and physical descriptions submitted to the state police bureau of identification of the division of state police within the department of public safety at the time of the arrest of a person subsequently adjudged a youthful offender shall be retained as confidential matter in the files of such bureau, and be opened to inspection only as hereinafter provided. Other data ordinarily received by such bureau, with regard to persons arrested for a crime, shall be forwarded to the bureau to be filed, in addition to the fingerprints, photographs and physical descriptions as mentioned above, and be retained in the division as confidential information, open to inspection only as

hereinafter provided. The court in its discretion, in any case, may permit an inspection of any papers or records and (1) such papers and records or any part thereof shall be made available to any judge for consideration in sentencing any person who has been convicted of a felony, as defined in section 53a-25 or an adult probation officer, if requested by him, for the purpose of making the investigation ordered under section 54-91a, with respect to the sentencing of such person; and (2) information obtained from such papers and records concerning the disposition of the case shall be made available to the victim of the crime if requested by him prior to the erasure of such papers and records under the provisions of section 54-76o, provided such information shall not identify the youthful offender involved, except that

(1) the identity of the person charged may be released to the victim upon written application by such victim to the court stating intent to bring a civil action for loss or damage resulting from such act; and (2) the identity of a person adjudged a youthful offender may be released to the victim upon written application by such victim to the court. Any institution to which a youth is committed shall have the right to inspect any of the records of any person committed to it as a youthful offender without a court order.

Section 54-76m provides:

The age of the youthful offender at the time of the commission of the crime set forth in the information or complaint shall determine whether he is entitled to the benefits provided by sections 54-76b to 54-76n, inclusive, and the provisions thereof shall apply to crimes committed

prior, as well as subsequent, to October 1, 1971.

Section 54-76n provides:

> The provisions of titles, 53, 53a and 54, including the right of appeal, shall apply to sections 54-76b to 54-76m, inclusive, insofar as they are applicable and not inconsistent herewith.

Section 54-76o provides:

> Whenever any person has been adjudicated a youthful offender and has subsequently been discharged from the supervision of the court or from the care of any institution or agency to whom he has been committed by the court, all police and court records pertaining to such youthful offender shall be automatically erased when such person attains twenty-one years of age, provided such person has not subsequent to being adjudged a youthful offender been

convicted of a felony, as defined in section 53a-25, prior to attaining such age. Youthful offender status shall not be deemed conviction of a crime for the purposes of this section. Upon the entry of such an erasure order, all references including arrest, complaint, referrals, petitions, reports and orders, shall be removed from all agency, official and institutional files. The persons in charge of such records shall not disclose to any person information pertaining to the record so erased. No youth who has been the subject of such erasure order shall be deemed to have been arrested ab initio, within the meaning of the general statutes, with respect to proceedings so erased. Copies of the erasure order shall be sent to all persons, agencies, officials or institutions known to have information pertaining to the proceedings affecting such youth.

APPENDIX B

NO. 13487
13488

IN RE A : SUPREME COURT

IN RE B : STATE OF CONNECTICUT

: NOVEMBER 1, 988

O R D E R

AFTER A HEARING ON WHETHER THE ABOVE-CAPTIONED APPEALS SHOULD BE DISMISSED FOR LACK OF A FINAL JUDGMENT, IT IS HEREBY O R D E R E D, SUA SPONTE, THAT THE APPEALS BE AND HEREBY ARE DISMISSED.

BY THE COURT

/s/ CAROLYN CUNHA ZIOGAS
ASSISTANT CLERK-APPELLATE

NOTICE SENT: NOVEMBER 1, 1988
BUCKLEY & SANTOS
M. HATCHER NORRIS
KEVIN McMAHON, ASSISTANT STATE'S ATTORNEY
STEVEN M. SELLERS, ASSISTANT STATE'S ATTORNEY
HARTFORD SUPERIOR COURT CLERK (54402, 54428, 54430, 5401)
HON. M. MORGAN KLINE

APPENDIX C

CR. NOS. 54402, 54428 SUPERIOR COURT

STATE OF CONNECTICUT J.D. OF HARTFORD/NEW BRITAIN

VS. HELD AT HARTFORD

SEAN BURKE and JULY 22, 1988

MARCOS PEREZ

B E F O R E: HONORABLE M. MORGAN KLINE, Judge

A P P E A R A N C E S:

For the State:

KEVIN McMAHON, ESQ.
Assistant State's
Attorney

For the Defendant:
Sean Burke

F. MAC BUCKLEY, ESQ.

For the Defendant:
Marcos Perez

HATCHER M. NORRIS, ESQ.

Reported by:

Theresa M. Glowinski
Certified Court Reporter

MR. NORRIS: On behalf of Marcos Perez, I waive the presence of the Burke family.

MR. BUCKLEY: I also waive the presence of the Perez family on behalf of Mr. Burke.

MR. McMAHON: For the record, other than court staff, and State's Attorney's staff, the only other persons present in the courtroom are the defendants and the victim's family.

THE COURT: We are here really on a ruling on the motion for treatment as a youthful offender. On both of the files that are before -- I'm sorry -- four files, there are two defendants, each has two files. First of all, I would like to review a couple of things that transpired on this past Tuesday. I don't recall what date is was, Tuesday of this week.

The lawyers for the two defendants in two related cases, the State's Attorney, and myself had a rather lengthy conference in my chambers to determine whether or not there was some way

by which YO status could be granted to these two youths that were involved in these matters.

Now, I indicated at that time that I wished, or actually believed that maybe the method in New York, the procedure followed in New York might be a better one, and might bring our statute, which is 54-76b through 54-76o, more in line with those procedures, and I still believe those procedures might, in a lot of respects, be better than the ones we follow here in the State of Connecticut. After some rather lengthy discussion, we felt we probably could use the procedure similar to that of New York here in the State of Connecticut, and remain within the purview of the statutes. However, to do that it is necessary to waive certain sections of this statute. There are at least two different areas which require waivers. There was one on the guilty plea, whether or not the defendants would be able to plead under the statute because of the way it

was worded in the mandatory requirements of that statute, and also the waiver of the determination of YO status when we entered the trial, rather than as a pre-trial decision.

Now, since Tuesday, after some rather lengthy reflection, I believe, and I'm sorry to say -- I will address myself to both the defendants and their attorneys -- I have had to bring myself into a different frame, or state of mind relevant to the statute, and I want to apologize at this time if I raised some hopes because of my remarks Tuesday, and I really have to do what I feel is right. Under the statute, the way it is written, one of the things that gave me a lot of concern is having the defendants waive their right to plead guilty, and be immediately mandatorily considered for youthful offender treatment. That waiver might give certain benefits to them. But, it would also mean the Court, by asking them to waive, would not be following

the procedures laid down by our own legislature. I further came to the conclusion, really, that if we are not -- if the statute has some defects, or not necessarily defects, but faults as far as procedures are concerned, those changes really should be made by the legislature, and not by the Court. I studied the statute very carefully, and I feel that the way it is written, the statute is constitutional in all its respects, and since it is constitutional in all respects, I feel very strongly it is the Court's obligation to follow the statute in its entirety as it has been enacted by our legislature, and to follow the procedures that we attempted to resolve in chambers, I think, will not be to comport to the legislative intent. I think that by following the procedures we discussed and though about in chambers, it would cause the Court to give up certain judicial prerogatives that the Court itself has as a result of

legislative intent, and would do violence to judicial discretion. 54-76d, subsection (b) allows the Court to determine, youthful offender status based upon examination, investigation, and questioning, which, unfortunately, at best would be a form of hearsay, but it sill allows the Court to make its decision as to whether or not the individual involved in the alleged criminal activity should or should not be granted youthful offender status. The Court makes its decision in those cases based upon the severity of the crime. It considers the factors set forth in the statute, but the severity of the crime is the key, and in both of these cases we have two different crimes charged, one of which in one case is a Class A felony, felony murder, and I understand there may or may not be other charges at that one, and incidentally, I don't feel, and I don't believe there is a lesser included offense in the charge of felony

murder. So, the case against the gentleman, felony murder charges would have to stand or fall on the basis of that charge in and of itself. It also means, further, that when and if a defendant is charged with the crime of something other than a Class A felony, whether it be a Class A, B, C, or D felony, I would be taking away from other judges, if I were deemed to be right, the ability to determine in their own discretion whether or not the crime is severe enough, taking into consideration all the factors set forth in the particular statute, whether or not the crime was severe enough to deny youthful offender status.

After having studied the file and read the remarks of the young men, regardless of who made them, they all acted together in the crime of robbery first degree, and I believe it was assault first degree, and the other crimes charged in context of the West Hartford incident were crimes that were lesser in

nature, and I, personally, feel the crimes are severe enough to warrant these young gentlemen be treated as adults. Yet these crimes were not as severe as the crime of felony murder. No matter what we feel or believe or think the taking of a human life is really the ultimate crime. It is the severest crime most of us can think of, though not the only severe crime, it is a severe crime. Taking of a human life is about as severe an act as anybody can engage in. To say these young men should not be tried as adults for taking of a life, but to say they should be tried as adults for robbery and assault is a contradiction of some kind. Whatever their offenses charged which are lesser crimes than a taking of a life, to give them adult status on those, and not on the felony murder makes absolutely no sense to this Court. As I said earlier, it creates a contradiction that is a senseless contradiction. I, personally, think a determination of whether or

not a person should be treated as a youthful offender is a determination, pre-trial determination, and to say that we hold that in abeyance until after the case is heard, by in this case a three-judge panel, and let them make a determination of severity, although it might be a better way of doing it, is not the way set forth in the statute and does not comport with the statute, and to ask for a waiver of that particular right by the defendants is one which I would hesitate to grant.

I, personally, feel that judicial discretion, judicial independence are things that should be jealously guarded, and are not to be given away by the bench lightly, and that is what in affect I would have to do in this case. I would have to voluntarily abandon my right to exercise judicial discretion in this case. I think that is discretion, and I indicated earlier, that should be both

jealously guarded, and zealously guarded, and I feel strongly enough to not want to give away that particular right of the judges, or that particular right of the Court. Further, if I were to -- as I indicated in chambers -- again, as I said earlier, if I were to ask the defendants to give up their right to plead guilty to charges of youthful offender, and I think in youthful offender status they should have the right, it is my feeling in order to properly comport with the statute I have to make the determination today as to what status should be granted to these young gentlemen. I feel very strongly, maybe our statute brought for youthful offenders should be addressed, as I said earlier, by the general assembly, and some changes made. But, I do not feel it is within my power to do so on this particular day. I do feel very strongly that the acts in both files, one being a murder, taking of a life, and the other being a rather severe

assault and robbery first degree with threats being made, with a display of a knife and other things occurring, the crimes are severe enough that not even young men not of tender years but lesser years, should know better. I do not want to get involved in a discussion of the morality of the problem that seems to be creative of these cases. By the same token, I want to assure you and everyone here that I refuse to give in to any kind of pressure, or any kind of pressure group, because I just won't do that, and I think that counsel here know me well enough to understand how strongly I might feel in that particular situation. I really care less about what they may feel, relative to my acting in a judicial capacity, in doing those things which I feel are right within the purview of the judicial system. I have not discussed this matter with other judges to ascertain what their feelings are relative to whether I am right or wrong, and I

do not want to be influenced by feelings or emotions that they may have with the surrendering of the judicial prerogatives. This is a decision I can assure you, I am making, solely on my own. I further recognize that it probably could result that it would probably be much more economical use of judicial time if these gentlemen were tried as youthful offenders, or under the youthful offender statute. I'm sure an appointment of a three-judge panel to try them on a Class A felony would be, a much more economical judicial utilization of judges, judicial utilization of the State's Attorney's office, and everything else that goes along with the trying of the case, than going through the jury selection, going through a trial of each of these individuals separately, independently. But, even it is were to the benefit of the judicial system to exercise that kind of judicial

economy, I feel that should not be a consideration in determination. We have going on right now a murder case that's on its fourth trial. You saw what happened down in New London just last week, and there is a case that took sixteen or eighteen weeks that is going on and that is going to have to be tried again. Judicial economy should not be any type of controlling factor in this kind of determination. I feel that if we adopted the New York procedure, it would save judicial time, and I feel that is a matter for the legislature to consider. I think it would serve other pending cases in this court, serving other people of adolescent years who might fall within the purview of the youthful offender statute, it would be much more economical and of social benefit of the Court system rather than going through lengthy jury trials. But, again, those are matters which I am not able to legislate, and which really belong in the purview of the

legislature. As far as judicial discretion is concerned, I just want to comment that the utilization of judicial discretion of pre-trial situations has been addressed by our own Supreme Court, both in State versus Bell, and State versus Longo, and I know you gentlemen know these situations, so well, I'm not even going to cite them, and they seem to have approved of the procedures that I am going to follow today, and the procedures which I'm going to follow in this case. I have no intention of trying to attempt to overrule our own Supreme Court. Accordingly, I am going to deny the motions of asking for youthful offender status in these cases in both files and the cases of both young men involved. I am going to further ask the reporter to type up my remarks in case the defense attorneys feel for some reason they would like to ask for an appellate review of my decision.

Anything further, gentlemen?

MR. NORRIS: I would ask that the record reflect our exceptions to the Court's ruling.

THE COURT: Of course.

MR. BUCKLEY:Also on behalf of my client, Mr. Burke, I would like to so except, and I would ask that the exceptions in terms of specificity be recognized as ones already stated in our brief, and in our legal argument, a week ago Friday I believe. Also, I would ask if we could have an expedited preparation of the transcripts since we have within possibly twenty days to appeal. Your Honor, has put a lot of thought into what you said here today. We might like to have specific things if we do appeal to the Supreme Court, based on the remarks. I also would like to file a plea, designated a stipulation, and waiver under seal, on behalf of each of our clients, two originals, two for each file. We executed it with both our defendants and the guardians. So that there is a record before the Supreme Court

of what specifically we were waiving and agreeing to, if your Honor agrees with these stipulations.

THE COURT: I would have no problem with that. Does the State take a position on it?

MR. McMAHON:Just for the preservation of the record, I have no position at all.

MR. BUCKLEY:Then the only other comment I would make, your Honor, I think your Honor's apology was very gracious, and I don't even know that certainly, in a legal sense you had to do that. We did not have an agreement the other day. We did have an understanding of what we would try to work out. We did convey that to our clients, that was one of the problems of getting into the system, things are not always as you hope they would be. The other comments I would make, I do feel that you have not battened to pressure. As a matter of fact, I have a pretty good idea how you feel about the pressure, and I just hope whoever

continues to handle this case will be able to do that in the same spirit. The pressure that has been attempted so far has not caused you to change your ruling, where it came from, if you were going to do anything, so I certainly don't think your ruling today is a product of what we have seen going on publicly.

C E R T I F I C A T I O N

CR NO. 54402, 54428
54401, 54430

SUPERIOR COURT

STATE OF CONNECTICUT

J.D. OF HARTFORD/NEW BRITAIN

VS.

HELD AT HARTFORD

SEAN BURKE and

JULY 22, 1988

MARCOS PEREZ

I hereby certify that the foregoing is a true and correct transcript of the proceedings in the above-entitled case heard before Honorable M. Morgan Kline, Judge of the Superior for the Judicial District of Hartford/New Britain, held at Hartford, Connecticut on July 22, 1988.

Dated at Hartford, Connecticut this 26th day of July, 1988.

/s/ Theresa M. Glowinski
Theresa M. Glowinski
Certified Court Reporter
C-18

APPENDIX D

NO. 54401 & 54430	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	J.D. OF HARTFORD/NEW BRITAIN
VS.	:	AT HARTFORD
MARCOS J. PEREZ	:	JULY 22, 1988

A STIPULATION AND WAIVER UNDER SEAL

On June 1, 1988, a warrant was issued for the arrest of Marcos J. Perez (hereinafter "Defendant") for felony murder in alleged violation of Connecticut General Statutes (hereinafter "C.G.S.") Section 53a-54(c) and robbery in the first degree in alleged violation of C.G.S. Section 53a-134. On June 6, 1988, a second warrant was issued for the arrest of the Defendant for robbery in the first degree in alleged violation of C.G.S. Section 53a-134, and unlawful restraint in the first degree in alleged violation of C.G.S. Section 53a-95, and assault in the third degree in alleged violation of C.G.S. Section 53a-61,

and larceny in the third degree in alleged violation of C.G.S. Section 53a-124.

On June 20, 1988, the Defendant filed a Motion for Investigation of Eligibility to be Adjudged a Youthful Offender pursuant to C.G.S. Section 54-76c. In the sealed Memorandum in Support of said Motion, as well as in a closed hearing before the Honorable M. Morgan Kline on July 15, 1988, the Defendant and the co-Defendant submitted to the court the following arguments:

1. Eligibility for youthful offender status is not precluded by the mere charging of a Defendant with a Class A felony because the plain language of the statute requires that youthful offender status turns on conviction and not on the crimes alleged in the indictment or information.

2. Connecticut's youthful offender statutory scheme is unconstitutional as a violation of the due process clause of the

state and federal constitution because it allows the court to determine youthful offender status before he is convicted of any crime.

In the July 15, 1988 closed hearing, Judge Kline reviewed the investigative report of the Defendant's background, conducted by the Office of Adult Probation pursuant to C.G.S. Section 54-76d(a), and accepted the probation officer's determination that the Defendant meets youthful offender criteria.

On July 19, 1988, a hearing was held in chambers between Judge Kline, defendant's counsel, counsel for co-defendant Burke and the State's Attorney. A discussion was held as to a method of procedure in this case that would accommodate the substantive and procedural problems of the youthful offender statutory scheme raised by the Defendant and his co-defendant.

As a result of this conference, the Defendant and his court-appointed legal

guardian, Mrs. Barbara Perez, mother of the Defendant, after consultation with and full disclosure by the undersigned counsel, hereby agree to the following:

1. The Defendant understands that the judicial proceedings regarding Docket No. 54401 and 54430 will be conducted in private in accordance with C.G.S. Section 54-76h as though he had already been adjudged a youthful offender; but Defendant recognizes that the determination by the Court of whether Defendant is eligible to be adjudged a youthful offender under C.G.S. Section 54-76d(b) will be made only upon conviction of the Defendant and following a presentence investigation conducted by the Office of Adult Probation.

2. The Defendant hereby waives his constitutional right to a trial by jury and recognizes that he will be tried by the Court without a jury pursuant to C.G.S. Section 54-76d and 54-76e. The Defendant also agrees

any trial on a charge of murder or felony murder will be by a three-judge Court.

3. The Defendant agrees that the determination of whether he is eligible to be adjudged a youthful offender will be made after a finding by the Court on the factual issues of what crimes were committed; and further, such determination includes the court's use of its discretion based on a review of the severity of the crime in accordance with C.G.S. Section 54-76d(b).

4. The Defendant stipulates that after a presentence investigation, (a) if the Court determines that the Defendant is eligible to be adjudged a youthful offender, the Court will refer to C.G.S. Section 54-76j in sentencing the Defendant; or (b) if the Court determines the Defendant ineligible to be so adjudged, it shall order all proceedings to be unsealed and the Defendant will be sentenced as an adult.

5. The Defendant freely, voluntarily, and

willingly makes an formal waiver of the rights afforded to him under C.G.S. Section 54-76g which requires the Court to adjudge the Defendant to be a youthful offender after the Defendant has entered a guilty plea or after a trial in which the Court finds the Defendant committed the acts charged against him; however, the Defendant does not waive C.G.S. Section 54-76g where Defendant enters into a plea agreement with the State that has been approved by the Court.

6. The Defendant shall receive the benefits under C.G.S. Section 54-76h that while said Defendant is incarcerated during these proceedings, those persons in charge of the place of detention shall segregate such Defendant, to the extent of their facilities, from Defendants over the age of eighteen years charged with crime.

I have discussed this with my attorney and my mother and I understand the rights that I am

waiving by signing this document and I wish to make this waiver in consideration of the benefits of a sealed trial and potential for youthful offender adjudication.

WITNESSED:

_____ _____

M. HATCHER NORRIS MARCOS J. PEREZ

_____

BARBARA PEREZ

CONSENT TO WAIVER

I, BARBARA PEREZ, mother and legal guardian of Marcos J. Perez, hereby agree and consent to the waiver executed by my son on this date relating to the trial and disposition of his two criminal cases. I have heard Attorney Norris explain the waiver and law to my son and I believe that I understand the waiver and I agree with my son that it is in his best interests to execute this waiver in consideration of the benefits of a sealed trial and potential for youthful offender adjudication.

_____

BARBARA PEREZ

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing was hand delivered this date, to the Office of the State's Attorney, 101 LaFayette Street, Hartford, Connecticut and all counsel

of record.

M. HATCHER NORRIS

NO. 54402 & 54428 : SUPERIOR COURT

STATE OF CONNECTICUT: J.D. OF HARTFORD/NEW BRITAIN

VS. : AT HARTFORD

SEAN BURKE : JULY 22, 1988

A STIPULATION AND WAIVER UNDER SEAL

On June 1, 1988, a warrant was issued for the arrest of Sean Burke (hereinafter "Defendant") for felony murder in alleged violation of Connecticut General Statutes (hereinafter "C.G.S.") Section 53a-54(c) and robbery in the first degree in alleged violation of C.G.S. Section 53a-134. On June 6, 1988, a second warrant was issued for the arrest of the Defendant for robbery in the first degree in alleged violation of C.G.S. Section 53a-134, and unlawful restraint in the first degree in alleged violation of C.G.S. Section 53a-95, and assault in the third degree in alleged violation of C.G.S. Section 53a-61, and larceny in the third degree in alleged

violation of C.G.S. Section 53a-124, and threatening in alleged violation of C.G.S. Section 53a-62.

On June 20, 1988, the Defendant filed a Motion for Investigation of Eligibility to be Adjudged a Youthful Offender pursuant to C.G.S. Section 54-76c. In the sealed Memorandum in Support of said Motion, as well as in a closed hearing before the Honorable M. Morgan Kline on July 15, 1988, the Defendant and the co-Defendant submitted to the court the following arguments:

1. Eligibility for youthful offender status is not precluded by the mere charging of a Defendant with a Class A felony because the plain language of the statute requires that youthful offender status turns on conviction and not on the crimes alleged in the indictment or information.

2. Connecticut's youthful offender statutory scheme is unconstitutional as a

violation of the due process clause of the state and federal constitution because it allows the court to determine youthful offender status before he is convicted of any crime.

In the July 15, 1988 closed hearing, Judge Kline reviewed the investigative report of the Defendant's background, conducted by the Office of Adult Probation pursuant to C.G.S. Section 54-76d(a), and accepted the probation officer's determination that the Defendant meets youthful offender criteria.

On July 19, 1988, a hearing was held in chambers between Judge Kline, defendant's counsel, counsel for co-defendant Perez and the State's Attorney. A discussion was held as to a method of procedure in this case that would accommodate the substantive and procedural problems of the youthful offender statutory scheme raised by the Defendant and his co-defendant.

As a result of this conference, the

Defendant and his court-appointed legal guardian, Mrs. Elaine Burke, mother of the Defendant, after consultation with and full disclosure by the undersigned counsel, hereby agree to the following:

1. The Defendant understands that the judicial proceedings regarding Docket No. 54402 and 54428 will be conducted in private in accordance with C.G.S. Section 54-76h as though he had already been adjudged a youthful offender; but Defendant recognizes that the determination by the Court of whether Defendant is eligible to be adjudged a youthful offender under C.G.S. Section 54-76d(b) will be made only upon conviction of the Defendant and following a presentence investigation conducted by the Office of Adult Probation.

2. The Defendant hereby waives his constitutional right to a trial by jury and recognizes that he will be tried by the Court without a jury pursuant to C.G.S. Sections

54-76d and 54-76e. The Defendant also agrees any trial on a charge of murder or felony murder will be by a three-judge Court.

3. The Defendant agrees that the determination of whether he is eligible to be adjudged a youthful offender will be made after a finding by the Court on the factual issues of what crimes were committed; and further, such determination includes the court's use of its discretion based on a review of the severity of the crime in accordance with C.G.S. Section 54-76d(b).

4. The Defendant stipulates that after a presentence investigation, (a) if the Court determines that the Defendant is eligible to be adjudged a youthful offender, the Court will refer to C.G.S. Section 54-76j in sentencing the Defendant; or (b) if the Court determines the Defendant ineligible to be so adjudged, it shall order all proceedings to be unsealed and the Defendant will be sentenced as an adult.

5. The Defendant freely, voluntarily, and willingly makes an formal waiver of the rights afforded to him under C.G.S. Section 54-76g which requires the Court to adjudge the Defendant to be a youthful offender after the Defendant has entered a guilty plea or after a trial in which the Court finds the Defendant committed the acts charged against him; however, the Defendant does not waive C.G.S. Section 54-76g where Defendant enters into a plea agreement with the State that has been approved by the Court.

I have discussed this with my attorney and my mother and I understand the rights that I am waiving by signing this document and I wish to make this waiver in consideration of the benefits of a sealed trial and potential for youthful offender adjudication.

WITNESSED:

F. MAC BUCKLEY	**SEAN BURKE**

ELAINE BURKE

CONSENT TO WAVIER

I, ELAINE BURKE, mother and legal guardian of Sean Burke, hereby agree and consent to the waiver executed by my son on this date relating to the trial and disposition of his two criminal cases. I have heard Attorney Buckley explain the waiver and law to my son and I believe that I understand the waiver and I agree with my son that it is in his best interests to execute this waiver in consideration of the benefits of a sealed trial and potential for youthful offender adjudication.

ELAINE BURKE

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing was hand delivered this date, to the Office of the State's Attorney, 101 LaFayette Street, Hartford, Connecticut and all counsel of record.

F. MAC BUCKLEY

APPENDIX F

No. 54402, 54428

STATE OF CONNECTICUT SUPERIOR COURT

VS. JUDICIAL DISTRICT HARTFORD

SEAN BURKE July 15, 1988

Before:

THE HONORABLE M. MORGAN KLINE,

Judge

Appearances:

KEVIN P. MC MAHON, ESQ.,
Assistant State's Attorney
Attorney for the State

F. MAC BUCKLEY, ESQ.,
Attorney for the Defendant

Also present:

M. HATCHER NORRIS and JOHN E. FRANCKLING, ESQS.,
Attorneys for Marcos Perez

Marvin Greene,
Court Reporter
101 Lafayette Street
Hartford, Connecticut

(MR. BUCKLEY:) I don't want to get into any factual background as to what the defenses will be, but I think your Honor can see certain things right at first blush.

You have the age of both participants; in my client's case, seventeen. You have the time of going through some serious sexual difficulty. There are claims of homophobia being an issue, in fear of homosexuals; the issue Mr. Norris raised of a prior sexual molestation of Mr. Perez, which, in fact, I'll say this much -- and I said it when they weren't here -- my client was the first one to be told at a very young and impressionable

(MR. BUCKLEY:) age, and he reacted in a way that will be germane later in the defense of this case.

But what the statute now allows -- and I don't think it does it intentionally -- is, it allows the State to pick the charges, and at some later stage, if they didn't measure up to be Class A offenses, either one, conviction or guilty plea, or the alternate situation, acquittal, the damage has already been done...

The other thing I'd ask the Court to consider -- and I think it's a very fair claim -- is that one should consider the severity of the crime in looking at the background of the particular person who is

(MR. BUCKLEY:)seeking YO.

And I think that here you have a very clear report as to Mr. Burke's background, his educational level, his home situation, his employment thing. He's done volunteer work with retarded people. We don't contest any of the background that's in that report, and I think that's a factor in which one looks at the severity of that person's particular conduct as alleged.

APPENDIX G

No. 54401, 54430

STATE OF CONNECTICUT SUPERIOR COURT

VS. JUDICIAL DISTRICT HARTFORD

MARCOS J. PEREZ July 15, 1988

Before:

THE HONORABLE M. MORGAN KLINE,

Judge

Appearances:

KEVIN P. MC MAHON, ESQ.,
Assistant State's Attorney
Attorney for the State

M. HATCHER NORRIS and JOHN E. FRANCKLING, ESQS.,
Attorneys for the Defendant

Also present:

F. MAC BUCKLEY, ESQ.,
Attorney for Sean Burke

Marvin Greene,
Court Reporter
101 Lafayette Street
Hartford, Connecticut

(MR. NORRIS:) With respect to the criminal record, of course, the record in this report is accurate. This is the first appearance before any court. I'm quite concerned about a very serious omission in the current personal history, and it is just beyond me how in this case, given the background of this case, given what the probation office would have read in the file, that they could have conceivably omitted this area.

There is a document, which purports to be a confession of my client, which relates that he was the subject of a sexual assault, compelled by force and violence to commit

(MR. NORRIS:) a homosexual act when he was eight years old. It's in his purported confession. It would have been in the possession of the probation office.

Those records, which will be the subject of a motion I'll be filing after I argue this, and which I have discussed with Mr. Bailey, appear in the juvenile records of the State of Connecticut Superior Court because the assailant of my client was a juvenile. He was arrested and prosecuted. And so the allegation of my client as a victim of assault is not something that he makes baldly, but in fact substantiated in the records of this Superior

(MR. NORRIS:) Court Juvenile Division.

However, there is absolutely no reference at all in the personal history of my client to that event ever having occurred.